INDIANA JUDICIAL CENTER

CASE CLIPS

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CRIMINAL LAW ISSUE

GONZALEZ v. STATE, No. 45A04-0101-CR-29, ___ N.E.2d ___ (Ind. Ct. App. Oct. 25, 2001). BROOK, J.

> THE COURT: We talked earlier about the Habitual Offender phase. [Footnote omitted.] Is it your client's wish to proceed with the trial by a jury or is he willing to waive the jury and be tried by the Court?
>
> BY MR. WOLOSHANSKY: He is willing to waive. And I ask the Court to bring him up here.
>
> THE COURT: Mr. Gonzalez, will you come up here, please? You understand – can you hear me all right? On the habitual offender you have the right to be tried by the jury or you can waive the jury and submit that to the Court. Your attorney has indicated you wish to waive the jury and submit that to the Court. Is that what you want to do? You have to respond audibly so the court reporter can pick you up.
>
> [GONZALEZ]: Yes, sir.
>
> THE COURT: And you understand what I have told you?
>
> [GONZALEZ]: Yes, sir.
>
> THE COURT: Okay.

. . .

. . . .

Given that the rights forfeited in guilty pleas and jury trial waivers are all constitutionally derived, [footnote omitted] and that our supreme court has not specifically enunciated a more stringent standard for reviewing the waiver of rights derived from our state constitution, we conclude that a defendant who considers waiving his right to jury trial need only be informed of the *likely* consequences of his decision. Our conclusion is supported not only by the specific language of *Brady*, but also by practical considerations; if courts were required to inform defendants of every conceivable consequence of waiving the right to jury trial, the wheels of justice would grind to a proverbial halt. [Citations omitted.]

Gonzalez argues that since he was not informed of the possibility of jury nullification, he was not "fully informed as to the consequences of electing not to have a jury make [the habitual offender] determination." . . . Although a defendant who waives his right to jury trial in a habitual offender proceeding would consequently forgo the *possibility* of jury nullification, in light of the above pronouncements we cannot conclude that nullification is

so likely to occur that a defendant must be informed of this consequence before he can knowingly waive his right to jury trial.

There are no cases or statutes specifically enumerating the "likely consequences" of which a defendant must be informed before waiving his right to jury trial, and we are not called upon to do so here. In *Kelley v. State*, 543 N.E.2d 638, 639 (Ind. 1989), our supreme court concluded that the trial court "was very thorough in its interrogation of appellant and in fully informing him of his rights and the consequences of the waiver of those rights":

> [The court] explained to appellant that if they proceeded with the jury trial a panel of impartial jurors would listen to the evidence and determine his guilt or innocence. He pointed out to appellant that even if one member of the jury believed he was not guilty, he would not be found guilty. He apprised appellant that if he waived a trial by jury, the judge, sitting alone, would listen to the evidence and determine his innocence or guilt. He also informed him that his trial on the theft charge and the question of his status as an habitual offender would be tried separately.

Although the trial court's "interrogation" in the instant case was not as extensive as that described in *Kelley*, Gonzalez does not claim that his waiver was unknowing with respect to the aforementioned consequences, including that "even if one member of the jury [found him not to be a habitual offender], he would not be found [to be a habitual offender]." [Citation omitted.] . . .

. . . .

BAILEY and KIRSCH, JJ., concurred.

CIVIL LAW ISSUES

MANGOLD v. INDIANA DEP'T NATURAL RES., No. 78S01-0110-CV-479, ____ N.E.2d ____ (Ind. Oct. 25, 2001).

RUCKER, J.

We grant transfer in this case and hold that on a complaint for negligence, the common law duty of care that a school owes its students is not dependent upon whether an injury a student suffers occurs on school property. We also reaffirm that subsection nine of the Indiana Tort Claims Act provides immunity to governmental entities only under very narrow circumstances.

. . . [A] Department of Natural Resources ("DNR") conservation officer conducted a hunter education class for students at Switzerland County Junior High School. The program was part of the school's science curriculum and addressed firearm safety. While instructing the class, the officer dismantled a shotgun shell, showed the students the

component parts, and explained what the parts do when the gun is fired. Among other things, the officer told the students that when the firing pin strikes the primer, the primer "sparks" setting fire to the powder. The officer also warned the students that they should never handle ammunition unless accompanied by an adult.

Twelve-year-old Matthew Mangold attended the class. After school, Matthew and his brother partially disassembled one of their father's shotgun shells. With his brother holding the shell with pliers, Matthew struck the firing pin with a hammer and chisel. Rather than causing a "spark" as Matthew expected, the shell exploded with a fragment striking Matthew in the face and leaving him blind in the left eye.

. . . Finding that DNR was immune under subsection nine of the Indiana Tort Claims Act and that Matthew as well as his father were contributorily negligent, on appellate review

the Court of Appeals affirmed the trial court's grant of summary judgment in favor of DNR. Mangold v. Indiana Dep't of Natural Res., 720 N.E.2d 424, 430 (Ind. Ct. App. 1999). The Court of Appeals also affirmed the trial court's grant of summary judgment in favor of School ruling that it owed Matthew no duty because "Matthew was injured at his home and not at school." Id. at 429. In order to address the law in this area, we grant Matthew's petition to transfer, but we affirm the trial court.

. . . In Miller v. Griesel, 261 Ind. 604, 308 N.E.2d 701, 706 (1974), this Court emphasized that schools are neither insurers of their pupils' safety nor strictly liable for any injuries that may occur to them. Nonetheless, we recognized a "duty for school authorities to exercise reasonable care and supervision for the safety of the children under their control." Miller, 308 N.E.2d at 706. . . .

Seizing on the "supervision" language in Miller, the Court of Appeals previously has declared that no duty exists where the injury to a student occurs off school property. See Brewster v. Rankins, 600 N.E.2d 154, 158 (Ind. Ct. App. 1992) (holding that teacher and school had no duty to prevent injury suffered by a child when his nine-year-old brother hit him with a golf club because "the accident occurred off of School property . . . [."] Swanson v. Wabash Coll., 504 N.E.2d 327, 331 (Ind. Ct. App. 1987) (holding school not liable for injuries sustained by a college student while practicing baseball at an off-campus location because school had no "duty to supervise [] recreational baseball practices."). Relying on Brewster and Swanson, the Court of Appeals in this case likewise reasoned that School owed Matthew no duty because his injuries did not occur on school property.

As this Court has previously observed, "Duty is not sa[]crosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." [Citation omitted.] By declaring that a school may be held liable for the injuries suffered by its students, we essentially have made a policy decision that a school's relationship to its students, the foreseeability of harm, and public policy concerns entitle students to protection. We articulate this expression of liability as a school's duty to exercise "reasonable care and supervision" for its students. [Citation omitted.] An approach that focuses on rearticulating that duty based upon a given set of facts is misplaced in our view because to do so presupposes that an issue which is thought to be settled must be revisited each time a party frames the duty issue a little differently.[1] Rather, because a school's duty to its students already has been established, the focus shifts to whether a given set of facts represents a breach of that duty.

Although the existence of duty is a matter of law for the court to decide, a breach of duty, which requires a reasonable relationship between the duty imposed and the act alleged to have constituted the breach, is usually a matter left to the trier of fact. [Citation omitted.] . . . As applied to the facts in this case, the question is whether School breached its duty of reasonable care and supervision by providing Matthew with inaccurate information and inadequate warnings when it instructed him on firearm safety. The fact that

Matthew's injuries occurred off school property may have a bearing on the foreseeability component of proximate causation. [Citation omitted.] However, we see no relationship between the location of Matthew's injuries and School's duty of reasonable care and supervision. Therefore, we conclude that the trial court erred in granting summary judgment to School on the ground that, as a matter of law, School owed Matthew no duty.

. . . .

[1] For example, in this case Matthew asserted, among other things, that School "had a duty . . . to provide age appropriate curriculum to the students and to teach that curriculum in an appropriate fashion." Br. of Appellant at 12. He cites no authority in support of this articulation of School's duty. And because this Court has already declared the nature of the duty a school owes its students, it is unnecessary to engage in the three-part Webb test to determine if the school has some other additional duty. See Webb, 575 N.E.2d at 995

(declaring that in defining duty, a court must balance: (1) the relationship between the parties; (2) the reasonable foreseeability of harm to the person injured; and (3) public policy concerns).

DNR asserts that it is immune from liability in this case under subsection nine of the ITCA which dictates: "A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from: . . . the act or omission of anyone
other than the governmental entity or the governmental entity's employee." Ind. Code § 34-13-3-3(9). Relying on Spier v. City of Plymouth, 593 N.E.2d 1255 (Ind. Ct. App. 1992), DNR argues that it is immune under this subsection because "the proximate cause of Matthew's injuries" is the act of Matthew's father in "leaving live ammunition accessible to his son while he was at work." [Citation omitted.]

We addressed subsection nine immunity in Hinshaw v. Board of Commissioners of Jay County, 611 N.E.2d 637 (Ind. 1993), and specifically rejected the rationale in Spier that subsection nine confers immunity to governmental entities and employees when an unforeseeable act of a third party is an intervening, proximate cause of the injury. [Citation omitted.] . . . [W]e narrowly construed subsection nine immunity, finding that it only applies in "actions seeking to impose vicarious liability [footnote omitted] by reason of conduct of third parties" other than government employees acting within the scope of their employment. [Citation omitted.] . . .

In this case Matthew is not seeking to impose vicarious liability on DNR by reason of conduct of a third party "other than [a] government employee acting within the scope of the employee's employment." Id. Rather, Matthew's complaint is founded upon the acts of the officer acting within the scope of his employment for DNR. Therefore, the trial court's grant of summary judgment in favor of DNR cannot be sustained on the ground that DNR is immune under subsection nine of the ITCA.

. . . Although summary judgment in favor of School cannot be sustained on the ground that School owed Matthew no duty; and summary judgment in favor of DNR cannot be sustained on the ground of immunity under the ITCA; according to a majority of this Court, Matthew still is entitled to no relief because of his own contributory negligence. . . .

[I] take a different view. . . .

. . . .

The record shows that at the time of his injury Matthew was twelve years old. . . . I am unprepared to say that as a matter of law Matthew was contributorily negligent. It appears to me that such a determination should be made by a jury as fact finder and should not be disposed of by summary disposition. [Citation omitted.] . . .

. . . .

DICKSON, J. concurred.

SHEPARD, C. J., and BOEHM, and SULLIVAN, JJ., concurred in part.

SHEPARD, C. J., filed a separate opinion on the issue of contributory negligence, in which BOEHM, and SULLIVAN, JJ., concurred, and which appears in part, as follows:

All five Justices join Justice Rucker's explication of the law on governmental immunity as it applies to this case. The trial court and the court of appeals wrongly held that the school and the Department of Natural Resources were immune.

The trial court was correct, however, to grant summary judgment for the defendants. . . . [T]his case is governed by the common law, under which even the slightest contributory negligence by a plaintiff bars recovery. [Citation omitted.]

Thus, to grant summary judgment to the defendants, the trial court need only have been satisfied that a twelve-year-old who smashed live ammunition with a hammer and

chisel in the face of his recent firearm safety instruction was minimally negligent as a matter of law. It was not error for the court to reach that conclusion.

JURICH v. GARLOCK, INC., No. 45A03-0010-CV-366, ___ N.E.2d ___ (Ind. Ct. App. Oct. 18, 2001).

BARNES, J.

We are well aware of the basic difference between a statute of limitation and a statute of repose: a statute of limitation marks the time within which a claim must be brought after a cause of action accures, while a statute of repose acts to bar a claim before it accrues. This difference does not save the product liability statute of repose in this case. On one hand, if Mr. Jurich was exposed to asbestos within ten years of the products' delivery, he did not suffer from any fully-manifested asbestos-related disease until much more than ten years after delivery; in that sense, his "cause of action" had not accrued before the statute of repose's deadline. It is clear from McIntosh [v. Melroe Co., 729 N.E.2d 972 (Ind. 2000)] that the legislature may provide that no cause of action may ever accrue if an injury arises after a certain "occurrence" date – i.e., in the PLA, the date of the product's initial delivery. However, latent diseases or injuries that take many years to become known pose a special problem – when does an "injury" occur or a "valid claim" come into existence? The date when a tort cause of action "accrues" is often defined, in the absence of legislative wording to the contrary, as the date when a plaintiff knew or should have known that he or she had suffered an injury due to another's product or act. [Citation omitted.] However, under this definition the plaintiff in Martin [v. Richey, 711 N.E.2d 1273 (Ind. 1999)] did not have an "accrued" cause of action within two years of the date of the wrongful occurrence – the alleged medical malpractice – because the very point of that case was that she could not have known or discovered that she was the victim of malpractice within that time frame. Where latent diseases or injuries are concerned, therefore, it appears from Martin that having a "valid claim," which cannot subsequently be extinguished by the legislature, is different from having an "accrued" cause of action, according to the usual definition of that phrase. On occasion, this court also has defined a cause of action as accruing "when a wrongfully inflicted injury causes damage." Keep v. Noble County Dep't of Pub. Welfare, 696 N.E.2d 422, 425 (Ind. Ct. App. 1998), trans. denied, (citing Monsanto Co. v. Miller, 455 N.E.2d 392, 394 (Ind. Ct. App. 1983)). This definition of an accrued cause of action, without reference to knowledge or ascertainability of the existence of an injury, seems applicable in cases of latent injury or disease when determining whether a "valid claim" exists for purposes of a statutory time limitation on when a "valid claim" may come into existence at all. [Footnote omitted.]

Both the pilot in Dague [v. Piper Aircraft Corp., 275 Ind. 520, 418 N.E.2d 207 (1981)] and the plaintiff in McIntosh suffered no "wrongfully inflicted injury" until after the effective date of the PLA and more than ten years after the initial delivery of the products. Mr. Jurich, on the other hand, allegedly inhaled asbestos dust from defendants' products for many years before the effective date of the PLA; after that date, there is no evidence that the products from which Mr. Jurich inhaled asbestos dust were more than ten years old. Experts estimate that it can take an asbestos-related disease between ten to forty and five to seventy years after exposure to manifest itself. . . . Thus, Mr. Jurich's every exposure to asbestos from defendants' products injured his lungs and contributed to his development of mesothelioma. However, this disease did not manifest itself until more than ten years after exposure. In this case, enforcement of the statute of repose would bar otherwise valid claims before the Jurichs could have been expected to have knowledge of those claims. We conclude that this runs directly afoul of Martin v. Richey. The holding of that case was succinctly stated in McIntosh: "a claim that exists cannot be barred before it

is knowable." [Citation omitted.] [Footnote omitted.] We conclude that applying the PLA statute of repose in this case has precisely that effect and therefore violates Article I, Section 12 of the Indiana Constitution.

. . . .

In sum, we hold that the PLA ten-year statute of repose is unconstitutional as applied to a claim such as the Jurichs': where a plaintiff is injured by an asbestos-containing product either by exposure to asbestos fibers before the enanctment of the PLA, and/or where there is no evidence the product was more than ten years old at the time the plaintiff was exposed to asbestos fibers contained in the product. [Footnote omitted.] Such a time limitation is an unreasonable legislative impediment on the bringing of an otherwise valid claim, due to the very long latency period of the development of asbestos-related diseases and the impossibility of the plaintiff's knowing whether such a disease is slowly progressing in his or her body. This represents a denial of justice that is inconsistent with Article I, Section 12 of the Indiana Constitution, as interpreted by Martin v. Richey.

. . . .

DARDEN and NAJAM, JJ., concurred.

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CASE CLIPS TRANSFER TABLE

November 2, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-00	10-01-01. 755 N.E.2d 589. No invasion of privacy action for University, a corporation, but other actions may be available. Injunctions properly issued.
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault has abrogated fellow servant doctrine.	10-24-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.	10-24-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Reeder v. Harper	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	730 N.E.2d 743 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Mercantile Nat'l Bank v. First Builders	732 N.E.2d 1287 45A03-9904-CV-132	materialman's notice to owner of intent to hold personally liable for material furnished contractor, IC 32-8-3-9, sufficed even though it was filed after summary judgment had been requested but not yet entered on initial complaint for mechanic's lien foreclosure	2-9-01	
State Farm Fire & Casualty v. T.B.	728 N.E.2d 919 53A01-9908-CV-266	(1) insurer acted at its own peril in electing not to defend under reservation of rights or seek declaratory judgment that it had no duty to defend; (2) insurer was collaterally estopped from asserting defense of childcare exclusion that was addressed in consent judgment; (3) exception to child care exclusion applied in any event; and (4) insurer's liability was limited to $300,000 plus post-judgment interest on entire amount of judgment until payment of its limits.	2-9-01	
Merritt v. Evansville Vanderburgh School Corp	735 N.E.2d 269 82A01-912-CV-421	error to refuse to excuse for cause two venire persons employed by defendant even though they asserted they could nonetheless be impartial and attentive	2-9-01	
IDEM v. RLG, Inc	735 N.E.2d 290 27A02-9909-CV-646	the weight of authority requires some evidence of knowledge, action, or inaction by a corporate officer before personal liability for public health law violations may be imposed. Personal liability may not be imposed based solely upon a corporate officer's title.	2-9-01	9-24-01. No. 27S02-0102-CV-101. Even if piercing the veil doctrine does not apply, civil liability for corporate environmental violations may be imposed on individuals under the "responsible cororate officer doctrine" codified in Indiana environmental statutes.
State v. Gerschoffer	738 N.E.2d 713 72A05-0003-CR0116	Sobriety checkpoint searches are prohibited by Indiana Constitution.	2-14-01	
Healthscript, Inc. v. State	724 N.E.2d 265, *rhrg.* 740 N.E.2d 562 49A05-9908-CR-370	Medicare fraud crimes do not include violations of state administrative regulations.	2-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Vadas v. Vadas	728 N.E.2d 250 45A04-9901-CV-18	Husband's father, whom wife sought to join, was never served (wife gave husband's attorney motion to join father) but is held to have submitted to divorce court's jurisdiction by appearing as witness; since father was joined, does not reach dispute in cases whether property titled to third parties not joined may be in the marital estate.	3-1-01	
N.D.F. v. State	735 N.E.2d 321 No. 49A02-0003-JV-164	Juvenile determinate sentencing statute was intended to incorporate adult habitual criminal offender sequential requirements for the two "prior unrelated delinquency adjudications"; thus finding of two prior adjudications, without finding or evidence of habitual offender-type sequence, was error	3-2-01	
Robertson v. State	740 N.E.2d 574 49A02-0006-CR-383	Hallway outside defendant's apartment was part of his "dwelling" for purposes of handgun license statute.	3-9-01	
Bradley v. City of New Castle	730 N.E.2d 771 33A01-9807-CV-281	Extent of changes to plan made in proceeding for remonstrance to annexation violated annexation fiscal plan requirement.	4-6-01	
King v. Northeast Security	732 N.E.2d 824 49A02-9907-CV-498	School had common law duty to protect student from criminal violence in its parking lot; security company with parking lot contract not liable to student under third party beneficiary rationale.	4-6-01	
State v. Hammond	737 N.E.2d 425 41A04-0003-PC-126	Amendment of driving while suspended statute to require "validly" suspended license is properly applied to offense committed prior to amendment, which made "ameliorative" change to substantive crime intended to avoid supreme court's construction of statute as in effect of time of offense.	4-6-01	
Buchanan v. State	742 N.E.2d 1018 18A04-0004-CR-167	Admission of pornographic material picturing children taken from child-molesting defendant's home was error under Ev. Rule 404(b).	5-10-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
McCary v. State	739 N.E.2d 193 49A02-0004-PC-226	Failure to interview policeman/probable-cause-affiant, when interview would have produced exculpatory evidence, was ineffective assistance of trial. Counsel on direct appeal was ineffective for noting issue but failing to make record of it via p.c. proceeding while raising ineffective assistance in other respects. Post-conviction court erred in holding res judicata applied under *Woods v. State* holding handed down after direct appeal..	5-10-01	
Equicor Development, Inc. v. Westfield-Washington Township Plan Comm.	732 N.E.2d 215 No. 29A02-9909-CV-661	Plan Commission denial of subdivision approval was arbitrary and capricious, notwithstanding it was supported by evidence, due to Commission's prior approvals of numerous subdivision having same defect.	5-10-01	
Martin v. State	744 N.E.2d 574 No 45A05-0009-PC-379	Finds ineffective assistance of appellate counsel for waiving issue of supplemental instruction given during deliberations on accomplice liability.	6-14-01	
Catt v. Board of Comm'rs of Knox County	736 N.E.2d 341 (Ind. Ct. App. 2000) No. 42A01-9911-CV-396	County had duty of reasonable care to public to keep road in safe condition, and County's knowledge of repeated washs-outs of culvert and its continued failure to repair meant that wash-out due to rain was not a "temporary condition" giving County immunity.	6-14-01	
Ind. Dep't of Environmental Mgt. v. Bourbon Mini Mart, Inc.	741 N.E.2d 361 No. 50A03-9912-CV-476	(1) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against automobile dealership; (2) third-party plaintiffs were collaterally estopped from pursuing indemnity claim against gasoline supplier pursuant to pre-amended version of state Underground Storage Tank (UST) laws; (3) amendment to state UST laws, which eliminated requirement that party seeking contribution toward remediation be faultless in causing leak, did not apply retroactively so as to allow contribution for response costs that were incurred before its effective date; and (4) third-party plaintiffs' action against gasoline supplier to recover ongoing remediation costs was not time barred.	6-14-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
In re Ordinance No. X-03-96	744 N.E.2d 996 02A05-0002-CV-77	Annexation fiscal plan must have noncapital services estimates from a year after annexation and capital improvement estimates from three years after annexation.	7-18-01	
Corr v. Schultz	743 N.E.2d 1194 71A03-0006-CV-216	Construes uninsured motorist statutes to require comparison of what negligent party's insurer actually pays out with amount of insured's uninsured coverage; rejects prior Court of Appeals decision, *Sanders*, 644 N.E.2d 884, that uninsured statutes use comparison of negligent party's liability limits to uninsured coverage limit ("policy limits to policy limits" comparison); notes that not-for-publication decision from same accident, *Corr v. American Family Insurance*, used *Sanders* to hold that the correct analysis was to "compare the $600,000 per accident bodily injury liability limit under the two policies covering Balderas [negligent driver] to the $600,000 per accident underinsured motor vehicle limit of the policies under which Janel [Corr] was an insured; transfer also granted 7-18-01 in this unreported *Corr* case.	7-18-01	
Friedline v. Shelby Insurance Co.	739 N.E.2d 178 71A03-0004-CV-132	Applies Indiana Supreme Court cases finding ambiguity in liability policies' exclusions for "sudden and accidental" and "pollutant" as applied to gasoline to hold that "pollutants" exclusion as applied to carpet installation substances was ambiguous and that insurance company's refusal to defend, made with knowledge of these Supreme Court ambiguity decisions, was in bad faith.	7-18-01	
St. Vincent Hospital v. Steele	742 N.E.2d 1029 34A02-0005-CV-294	IC 22-2-5-2 Wage Payment Statute requires not only payment of wages at the usual frequency (e.g., each week, etc.) but also in the correct amount, so Hospital which relied on federal legislation and federal regulatory interpretation for its refusal to pay physician contract compensation amount was liable for attorney fees and liquidated damages under Statute.	7-18-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Smith v. State	748 N.E.2d 895 29A02-00100PC-640	Error to find PCR laches when petition was filed within 27 days of sentencing and all ensuing delays due to Public Defender; guilty plea to six theft counts, for stealing a single checkbook containing the six checks, was unintelligent due to counsel's failure to advise of "single larceny" rule; the theft of the checkbook and ensuing deposits of six forged checks at six different branches of the same bank in the same county "within a matter of hours" were a "single episode of criminal conduct" subject to limits on consecutive sentencing and counsel's failure to discuss the single episode limit also rendered plea unintelligent.	7-19-01	
Martin v. State	748 N.E.2d 428 03A01-0012-PC-412	Holds that no credit for time served is earned by one on probation as a condition of probation, distinguishing *Dishroon v. State* noting 2001 amendment providing for such credit is inapplicable.	8-10-01	
State Bd. of Tax Comm'rs v. Garcia	743 N.E.2d 817 (Tax Ct. 2001) 71T10-9809-TA-104	Calculation by which Grade A-6 assessment was reached was not supported by regulations and hence was arbitrary and capricious. Swimming pool assessment as "A" rather than "G" was likewise outside regulations and reversed.	8-13-01	
Dunson v. Dunson	744 N.E.2d 960 (Ind. Ct. App. 2001) 34A02-0006-CV-375	Construes emancipation statute to require only that child not be under the care or control of either parent without any requirement he also be able to support himself without parental assistance.	8-13-01	
D'Paffo v. State	749 N.E.2d 1235 (Ind. Ct. App. 2001) 28A004-0010-CR-442	Child molesting instruction's omission of element of intent to gratify sexual desires when touching was fundamental error, not waived by failure of appellant to object, notwithstanding defense that victim was never touched at all. When witnesses had been cross-examined and given chances to explain prior inconsistent statements, the statements themselves were properly excluded as impeachment, Evidence Rule 613.	8-24-01	
Farley Neighborhood Association v. Town of Speedway	747 N.E.2d 1132 49S02-0101-CR-43	Continuation of 45-year-old 50% surcharge on sewage service to customers outside municipality was arbitrary, irrational, and discriminatory..	9-20-01	
Neher v. Hobbs	752 N.E.2d 48 92A04-0008-CV-316	Trial judge erred in requiring new trial when jury found defendant negligent but awarded $ 0 damages, as jury clearly found injury was preexisting.	9-6-01	
Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne	747 N.E.2d 638 02A04-0005-CV-219	Restaurant was subject to exception to City's anti-smoking ordinance.	9-20-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Hall Drive Ins, Triangle Park v. City of Fort Wayne	747 N.E.2d 643 02A03-0005-CV-189	Companion case to *Hall Drive Ins, Hall's Guesthouse v. City of Fort Wayne*, above	9-20-01	
Ind. Dep't of Revenue v. Deaton	738 N.E.2d 695 73A01-0002-CV-49	State income tax warrant's filing with county clerk does not create a judgment for proceedings supplemental.	9-26-01	9-26-01. 755 N.E.2d 568. Tax judgment lien may be collected through proceedings supplemental without first filing suit and obtaining a judgment of foreclosure.
Johnson v. State	47A04-0103-PC-112	Under Appellate Rule 49 an appeal may be dismissed for failure to file an appendix.	10-22-01	10-22-01. No. 47S04-0110-PC-478. The failure to file an appendix with the appellate brief is not necessarily automatic cause for dismissal.
Mangold v. Ind. Dept. Natural Resources	720 N.E.2d 424 78A01-9903-CV-88	No duty owed by school to student when student not on school property.	10-25-01	10-25-01. No. 78S01-0110-CV-479. General duty for school to exercise reasonable care for and supervision of students should not be "rearticulated" in terms of a given set of facts, as such may erroneously constrict the duty's scope, as here with the "school property" ruling.